SUPREME COURT, U. S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 532

Office-Supreme Court, U.S.
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E. B. WILCOX,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

OBJECTION TO AMICUS CURIAE PETITION AND BRIEF OF AMERICAN TRIAL LAWYERS ASSOCIATION ADMIRALTY SECTION

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OBJECTION TO AMICUS CURIAE PETITION AND BRIEF OF AMERICAN TRIAL LAWYERS ASSOCIATION ADMIRALTY SECTION

Respondent American President Lines, Ltd. objects to the American Trial Lawyers Association Admiralty Section's *Amicus Curiae* Petition and Brief in favor of Petitioner as follows:

1. REQUEST FOR CONSENT

Rules 42(1) and (3) of this Court make it clear that a motion for leave to file a brief *amicus curiae* is in order

only after refusal of a party to consent to the filing of such a brief. Although the *Amicus Curiae* Petition contains no allegation that consent was requested, it appears that Martin J. Jarvis, Esq., attorney for Petitioner E. B. Welch himself, on August 22 or 23, 1967, about the time the Petition for Certiorari was filed, inquired, in a telephone conversation with Frederick W. Wentker, Jr., of Counsel for Respondent, for consent to the filing of a brief on behalf of the American Trial Lawyers Association in support of the Petition and was advised that consent would not be granted, since it appeared that there was no reason for permitting Petitioner's attorney and his colleagues similarly situated to file a brief, using the *amicus curiae* device, in avoidance of the rule prohibiting Petitioner's attorney, acting alone, from filing such a brief in support of the Petition.

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2. UNTIMELINESS

Rule 24(3) of this Court provides that the petition, the record and brief be distributed to the Court for its consideration upon the expiration of the period for filing the Respondent's brief. Rule 42(1) provides that a motion for leave to file an *amicus curiae* brief when consent is refused may be filed only if submitted a reasonable time prior to the consideration of the petition. Rule 42(3) provides only for such motions as are "timely".

The period for filing the Respondent's brief in this matter expired September 22, 1967, and the present *Amicus Curiae* Petition was dated at New York October 25, 1967, and received by Respondent's attorney October 27,

1967. The filing and service are untimely and unreasonable. If the Brief of *Amicus Curiae* set forth facts or questions of law which had not been adequately presented by the parties, or any other new matters worthy of the Court's consideration, the lateness of the motion would leave Respondent with inadequate time to consider such matters and respond to them.

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3. INADEQUACY OF INTEREST

It is to be noted that the application does not come from any of the labor unions who diligently represent the interests of American seamen. The statement of interest of the American Trial Lawyers Association Admiralty Section shows only that it is an association of lawyers situated similarly to the attorney for the petitioner in this proceeding, presumably himself a member of that Association. The interest of the Association is set forth with something less than candor. It is general knowledge that the attorneys in cases of this sort are engaged upon contingent fee contracts and that their fees are therefore directly proportional to the amounts of the awards. The immediate interest of the attorneys comprising the Association is therefore an interest in larger fees, which differs not at all from the interest any litigant has in securing a larger award. Such an interest, however cloaked in unctuous expressions of concern for others, is not an appropriate basis for intervention as *amicus curiae*. It may be added that the statement of the size of the interested class for whom the Association purports to speak is a gross and patent exaggeration.

4. ADEQUACY OF PRESENTATION OF FACTS AND QUESTIONS OF LAW

Rule 42(3) of this Court requires the motion to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties". The *Amicus Curiae* Petition does not set forth any such facts or questions of law nor assert that they have not been or may not be adequately presented by the attorney for the Petitioner. Reference to the proposed Brief of *Amicus Curiae* confirms that there are no such facts or questions. In the proposed Brief the Petitioner's statement of the case is adopted by reference. As to questions of law, the proposed Brief presents two, which are simply a re-ordering and re-phrasing of the three questions presented in the Petition.

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5. PRELIMINARY COMMENTS ON THE PROPOSED BRIEF OF AMICUS CURIAE

Upon a cursory review in the time available, the proposed Brief of *Amicus Curiae* appears to present nothing new bearing on the questions before the Court.

No new light whatever appears to be shed upon the fact question involved in the finding of contributory negligence.

With respect to the Petitioner's contention that the rule of comparative negligence should be abandoned in connection with the unseaworthiness ground of the seaman's cause of action for personal injury, the proposed Brief appears to reiterate in various ways the unintelligible argument that, while a shipowner at fault may have a re-

duction of damages on account of the negligence of the injured man, a shipowner held on the basis of unseaworthiness without fault should have his sins brought sharply home to him by the denial of such a reduction.

In support of this view the proposed Brief appears to rely principally upon the same maritime cases as the Petition, adding, however, an unwarranted argument from *Waldron v. Moore-McCormack Lines,* 386 U.S. 724, 1967 A.M.C. 579 (1967). In *Waldron* this Court had before it the question of the existence of a basis for the finding of unseaworthiness, rather than any question of a change in the effect of contributory negligence. If an attempt is now being made to draw a distinction between unseaworthiness based on inadequate crew, as in *Waldron,* and unseaworthiness in other respects, it is refuted in advance by the *Waldron* case, which denies any justification "for drawing a distinction between the ship's equipment, on the one hand, and its personnel, on the other" (386 U.S. at 726, 1967 A.M.C. at 581).

In short, it appears that the Brief of *Amicus Curiae* which is sought to be filed at this very late date is simply an attempt of colleagues of Petitioner's attorney to have the last word by a device not available to the Petitioner directly.

6. CONCLUSION

For the foregoing reasons and because "such motions are not favored" (Rule 42) it is respectfully submitted that the *Amicus Curiae* Petition of the American Trial Lawyers Association Admiralty Section should be denied.

Dated, San Francisco, California,
October 30, 1967.

Respectfully submitted,
GRAYDON S. STARING,
Attorney for Respondent.

FREDERICK W. WENTKER, JR.,
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
Of Counsel.